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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

SYLVIA BARNSON, *et als.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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July 13, 1987

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QUESTION PRESENTED

Did Congress intend that the discretionary function exception to the Federal Torts Claim Act would immunize the actions of a federal employee who is not exercising policy-making authority – and who is not acting in accordance with directives from his/her superiors?

TABLE OF CONTENTS

Page

QUESTION PRESENTED. i

TABLE OF AUTHORITIES iii

OPINIONS BELOW. 1

JURISDICTION 2

STATUTUES INVOLVED 2

STATEMENT OF THE CASE. 2

REASONS FOR GRANTING THE WRIT. 5

CONCLUSION 9

APPENDIX:

A. Opinion of the Court of Appeals for the Tenth Circuit A-1

B. Opinion of the United States District Court B-1

C. Court of Appeals Judgment Order and Mandate C-1

D. Affidavit of Duncan Holaday D-1

E. Statutes Involved. E-1

F. List of Petitioners F-1

TABLE OF AUTHORITIES

CASES: Page

Alabama Electric Co-op v. U.S.,
769 F.2d 1523 (11th Cir., 1985). 9

Anderson v. Liberty Lobby, Inc.,
106 S. Ct. 2510 (1986) 7

Aslakson v. U.S.,
790 F.2d 688 (1985) 9

Begay v. U.S.,
768 F.2d 1059 (9th Cir., 1985). 9

Dalehite v. U.S.,
346 U.S. 15 (1953) 4, 5, 6, 7, 9

Drake Towing Co. v. Meisner Construction Co.,
765 F.2d 1060 (11th Cir., 1985). 9

Indian Towing v. U.S.,
350 U.S. 61 (1955) 6, 7

McMichael v. U.S.,
751 F.2d 303 (8th Cir., 1985). 9

Rayonier, Inc. v. U.S.,
352 U.S. 315 (1957) 8

U.S. v. Johnson,
No. 85-2039 U.S. Supreme Court,
May 18, 1987 8

U.S. v. Varig Airlines,
467 U.S. 797 (1984) 4, 6, 7, 9

STATUTES AND RULES:

Federal Tort Claims Act,
28 U.S.C. § 1346(b). 2671 *et seq.* 2, 5, 8

Federal Rule of Civil Procedure 56 . . . . . .2, 7

OTHER AUTHORITIES: Page

Zillman, "Regulatory Discretion: The Supreme Court Reexamines the Discretionary Function Exception to the Federal Tort Claims Act", Military Law Review, Vol. 110, p. 117 (1985) 7

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit affirming the judgment in favor of the defendant is not yet officially reported, and is printed as Appendix A.

The opinion of the United States District Court for the District of Utah granting a summary judgment to the defendant is officially reported at 630 F. Supp. 418, and is printed as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered April 17, 1987. The petitioners invoke the jurisdiction of this Court under and pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Federal Tort Claims Act, 28 U.S.C. § 1346(b), 2671 *et seq.* The relevant sections of this statute are set forth in Appendix E.

Federal Rule of Civil Procedure 56. This rule is also set forth in Appendix E.

STATEMENT OF THE CASE

The 51 petitioners are the survivors of deceased uranium miners (who contracted lung cancer) and disabled former uranium miners (who suffer from pulmonary diseases) as a consequence of radiation they inhaled in some of the first uranium mines opened and operated in the United States near the community of Marysvale, Utah. (For list of petitioners, *see* Appendix F.)

Soon after these miners began working underground in 1950, readings taken by industrial hygienists who worked for the U.S. Public Health Service (PHS) revealed radiation concentrations in some mines that were 1,000 times higher than the "allowable" levels for U.S. radon workers. These PHS hygienists knew from the outset that a lung cancer epidemic would occur if these miners were not protected – and they also knew that low-cost ventilation systems were available and could be installed that would protect the health of these miners by sweeping the radon gases out of the mines.

The PHS hygienist who first inspected the Marysvale mines in early 1950 was a senior sanitary engineer, Duncan Holaday. In order to gain entry to these mines so he could assess the radiation hazards, Holaday entered into an informal understanding with the mine operator that he would be allowed to make inspections and take radiation readings on condition that he would not alarm (*i.e.*, warn) the miners about the invisible radiation risks they were encountering in their places of work. [1]

Duncan Holaday described what he did – and the circumstances surrounding the actions he took – in an affidavit (*see* Appendix D) he filed in response to the government's motion for summary judgment. In this declaration he made the following affirmations:

a) that he first became involved in the radiation safety problem in U.S. uranium mines in 1949, and that soon thereafter he began serving as the chief PHS investigator regarding this industrial health problem;

b) that he was operating in the field on his own when he decided to make the informal oral agreement with the mine operator not to warn the miners;

c) that neither the Surgeon General nor any of his subordinates ever directed his activities, or established a "protocol" to guide, the conduct of his work;

d) that none of his superiors made any policy decisions about whether the uranium miners should be warned, or not warned;

e) that none of his superiors ever made a policy decision that this radiation safety problem should be left in the hands

---

[1] The Public Health Service had no statutory authority to regulate safety in U.S. mines.

of the states because he and his colleagues were aware that the states were not prepared to handle this safety problem; and

f) that subsequent to the agreement not to warn the Marysvale miners, when he realized that the State of Utah was not prepared to handle this radiation safety problem, he voluntarily took action and spearheaded efforts from 1949 until some time in the mid-1950's to get safety controls (*i.e.*, ventilation fans) installed in the uranium mines.

This testimony presented by Duncan Holaday was the crucial evidence before the district court when it ruled on this government's motion for summary judgment. It was pivotal because Holaday was *the* federal actor. It was pivotal because Holaday acted on his own – and consequently there was no way the government could contravene his declarations. And it was pivotal because (under the standard rule of interpretation that prevails where motions for summary judgment are made) all "justifiable inferences" favorable to the petitioners had to be drawn by the district court in evaluating the merits of the government's motion.[2]

Had this cause been adjudicated prior to 1984, under discretionary function test set forth in the seminal case of *Dalehite v. United States*, 346 U.S. 15 (1953), Holaday would have been deemed an operational employee of the federal government – and the petitioners would have prevailed. In 1985, however, the trial court reached a contrary result by giving a sweeping interpretation to language in the new case of *U.S. v. Varig Airlines*, 467 U.S. 797 (1984), and deciding that Duncan Holaday was a Public Health Service "executive" who was making a discretionary policy decision for PHS when he decided not to convey information about the radiation dangers to the Marysvale miners.

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[2] It is revealing that the opinions rendered by the trial and appellate courts failed to make any reference to the petitioners' facts recited in Duncan Holaday's crucial affidavit evidence.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit Court of Appeals has applied the discretionary function exception to the Federal Tort Claims Act in a manner that conflicts with the applicable decisions of this Court.

In enacting the Federal Tort Claims Act (FTCA) in 1946, the Congress waived the hoary doctrine of sovereign immunity as a gesture to modernize and civilize the American legal system. However, discretionary function was not defined in that statute with any specificity – and the legislative history provided few guidelines to help the courts interpret this concept.

In its *Dalehite* opinion a plurality of this Court attempted to clarify this fuzzy concept and enunciated a doctrine that Congress intended to protect "the discretion of the executive or administrator to act according to one's judgment of the best course, a concept of substantial historic ancestry in American law." *Id.* at 34. The *Dalehite* Court described the discretionary function exception to include the initiation of programs and activities ". . . as well as determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision, there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. *Id.* at 35-36.

The *Dalehite* Court explained that the "acts found to have been negligent were . . . performed under the direction of a plan developed at a high level under a direct delegation of policymaking authority from the apex of the Executive Department," *Id.* at 40, and set forth an operational/planning test by arriving at the conclusion that "the decisions held culpable were all responsibly made at a planning rather than operational level." *Id.* at 42.

This planning/operational distinction was reiterated in *Indian Towing v. United States*, 350 U.S. 61, 64 (1955), where this Court decided that the negligence occurred at the "operational level" of government as a good Samaritan undertaking – and therefore did not involve the discretionary function exception.

This Court did not reconsider the discretionary function exception for twenty-nine years after its *Indian Towing* decision. During that interval, the lower courts used the guidelines laid out in *Dalehite* and *Indian Towing* to decide over 100 FTCA casés. These federal courts developed increasingly sophisticated rationales as they applied the *Dalehite* tests to a wide range of complex fact situations involving negligent acts by federal agencies and employees.

In 1984, in *U.S. v. Varig Airlines*, 467 U.S. 797, the court finally re-visited the discretionary function exception and held that regulatory agencies are protected by the exception when they are carrying out their licensing and inspection functions. Yet, although the opinion of the *Varig* court was expressly linked to a presumption that Congress intended that conventional activities of federal regulatory agencies were to be immunized from tort liability, the opinion as a whole was couched in language that created more confusion than clarity.

Varig initially asserted that *Dalehite* "represents a valid interpretation of the discretionary function exception", *Varig* at 811-12, but later fashioned a "nature of the conduct" test that some courts have construed as obliterating the planning/operational test that was the essence of the *Dalehite* decision.

It is the confusion created by this construction of *Varig* that brings these petitioners to the bar of this court. One of the scholars, Professor D.N. Zilliman, who has been a prominent student of sovereign immunity law, used these words to describe the contours of this confusion:

> "The decision of the United States Supreme Court in *United States v. Varig Airlines* on June 19, 1984, provided an opportunity to reformulate discretionary function law. While the Court in *Varig* emphatically decided the two companion cases in the government's favor, it left much unclear. The opinion paid little attention to the evolution of discretionary function law since 1953. Even in the area of government liability for negligent inspection, the point at issue in the cases, the opinion left many matters unresolved. As a result, lower courts, administrative agencies, and attorneys will continue to struggle with the meaning of the discretionary function exception." "Regulatory Discretion: The Supreme Court Reexamines the Discretionary Function Exception to the Federal Tort Claims Act," Military Law Review, Vol. 110, p. 117 (1985).

Today, the confusion generated by *Varig* confronts lawyers and federal judges with these excruciating questions:

1) Did *Varig's* nature-of-the-conduct test cancel the criteria set out in *Dalehite's* planning/operational test?

2) Did this Court intend that the rule it adopted in *Varig* should apply across the board in all FTCA cases, or just in cases involving the torts of federal regulatory agencies?

3) Did *Varig* extend the discretionary function exception to everyday "decisions" in the field by low-level federal employees?

4) Did *Varig* extinguish all good Samaritan claims previously cognizable under the *Indian Towing* decision?

When any Court is asked to rule on a motion for summary judgment, "(t)he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2510 (1986). Thus, a summary judgment could not be granted in *Barnson* unless

it was permissible, in light of Duncan Holaday's undisputed evidence, to conclude that he was either a federal policy-making official, or was acting under policy directives issued by his superiors.

The district court sought to get around the insurmountable obstacle presented by Holaday's affidavit evidence by invoking two "dispositive factors": a) that a study of the death-dealing impact of the mine radiation "would not have been possible without secrecy," and b) that "the AEC's concerns about national security" influenced Holaday's decision not to warn the Marysvale miners. (Appendix B, p. 5; Appendix A, p. 7)

The flaw in this astounding finding is that there was no evidence to support such a thesis. Duncan Holaday was *the* federal actor in this cause: he, and he alone, knows what "concerns" influenced his decision not to warn the miners. The dispute over this issue can only be resolved by Holaday's testimony at a trial.

Further, it is both incomprehensible and ignoble for the government to contend that the lives of the Marysvale miners had to be sacrificed on the altar of a federal deathwatch "study" when their health could have been readily protected by ventilating fans.

In his May 18, 1987, dissent in *United States v. Johnson*, No. 85-2039, Supreme Court Justice Scalia reminded this Court of its admonition in *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957):

> "There is no justification for this Court to read exemptions into the (Federal Tort Claims) Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it."

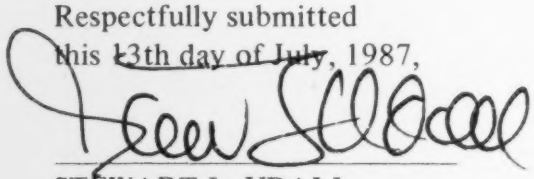
Yet, this is plainly a cause in which courts have erected exculpatory exemptions which were never contemplated by

Congress. If the Tenth Circuit's decision is not corrected and clarified, *Varig* will stand in the annals of American jurisprudence as an instance where the judicial branch of government – by fiat – emasculated a national policy Congress enacted after nearly a decade of deliberation.[3]

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted
this 13th day of July, 1987,



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[3] The gravity of the conflict among the Circuits regarding the application of the tests enunciated in *Varig* can be gauged by comparing the interpretations adopted by the Tenth Circuit in *Barnson* and by the Ninth Circuit in *Begay v. U.S.*, 768 F.2d 1059 (where the Ninth Circuit held, at 768 F.2d 1062-3, that *Varig* nullified the planning/operational test enunciated in *Dalehite*), with divergent contemporaneous opinions handed down by the Eighth Circuit (in *Aslakson v. U.S.*, 790 F.2d 688, and *McMichael v. U.S.*, 751 F.2d 303) and by the Eleventh Circuit (in *Drake Towing Co. v. Meisner Marine Construction Co.*, 765 F.2d 1060, and in *Alabama Electric Co-op v. U.S.*, 769 F.2d 1523).

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
APR 17 1987
ROBERT L. HOECKER
Clerk

SYLVIA BARNSON, et als,
Plaintiffs-Appellants,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 85-2470

Appeal from the United States District Court
for the District of Utah
(D.C. Nos. C-80-0119A, C-81-0045W,
C-81-0715J, and C-81-0719W)

Stewart L. Udall, Phoenix, Arizona (Thomas S. Udall, Albuquerque, New Mexico and Kenly W. Burnsdale, Salt Lake City, Utah with him on the briefs) for Plaintiffs-Appellants.

John P. Schnitker, United States Department of Justice, Washington, D.C. (Robert S. Greenspan, United States Department of Justice, Washington, D.C.; Brent D. Ward, United States Attorney, Salt Lake City, Utah; Richard K. Willard, Assistant Attorney General, Washington, D.C.; J. Michael Farrell and Edward Jiran, Department of Energy, Washington, D.C.) for Defendant-Appellee.

Before McKAY and BALDOCK, Circuit Judges, and BROWN, District Judge.*

BALDOCK, Circuit Judge.

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* Honorable Wesley E. Brown, United States District Judge, District of Kansas, sitting by designation.

Uranium miners and survivors of deceased uranium miners brought suit against the United States to obtain money for injuries arising from radiation exposure. The district court granted summary judgment, finding the employees of the government performed discretionary functions and concluding the United States is immune from tort liability. For the reasons set forth below, we affirm.

I.

Plaintiffs-appellants brought suit in February 1980 against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671-80, seeking recovery for injuries sustained as a result of the exposure of miners to radiation in privately owned and operated mines in Utah. In particular, the alleged employees of the United States Public Health Service (PHS), who were conducting medical and environmental surveys associated with radiation in uranium mines, failed to warn miners of hazards, negligently provided safety services to miners, and were otherwise negligent. They also asserted that the Atomic Energy Commission (AEC) breached a statutory duty to protect miners from radiation.[1] After extensive discovery, the government moved for summary judgment, arguing sovereign

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[1] This case is very similar to *Begay v. United States*, 591 F. Supp. 991 (D. Ariz. 1984), *aff'd*, 768 F.2d 1059 (9th Cir. 1985). Indians who formerly worked in underground uranium mines brought suit under the Federal Tort Claims Act. The same PHS study was involved in *Begay*. The Indians alleged the government was actionably negligent (1) in leaving uranium mine safety outside the Indian reservation to the states, (2) in failing to enforce radiation safety levels in reservation mines, (3) in failing to warn miners of possible radiation injury, and (4) in failing to establish and enforce radiation safety standards in uranium mines. The district court and court of appeals ruled that the government was shielded from tort liability by the discretionary function exception.

immunity bars recovery from the United States because of the discretionary function exception contained in the second clause of 28 U.S.C. § 2680(a).[2] The district court granted summary judgment, finding the acts of the government employees were discretionary and also ruling the AEC had no mandatory duty to regulate uranium mine safety. *Barnson v. United States*, 630 F. Supp. 418, 420-23 (D. Utah 1985).

On appeal, appellants assert summary judgment was improper because there exist disputed facts, the AEC had a mandatory duty to protect the miners, and the discretionary function exception should not apply to negligent medical care. We must decide, therefore, the following issues:

(1) whether the district court erred in finding that there are no material issues of fact in dispute which are pertinent to the government's defense of sovereign immunity;

(2) whether the district court erred in concluding the discretionary function exception should apply to the negligence claims; and

(3) whether the district court erred in concluding the AEC has no mandatory duty to protect the miners from radiation exposure.

---

[2] 28 U.S.C. § 2680(a) provides that the Tort Claims Act's waiver of immunity shall not apply to

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, *or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved is abused.* (Emphasis added.)

II.

The Federal Tort Claims Act provides a general exception to sovereign immunity by authorizing suits against the United States for

> injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). Although this is a broad waiver of immunity, the United States is subject to suit only to the extent provided by law, and the waiver may not be extended or narrowed beyond that which Congress intended. *Ewell v. United States*, 776 F.2d 246, 248 (10th Cir. 1985). Of particular importance here is the exception contained in 28 U.S.C. § 2680(a) for discretionary functions.

The discretionary function exception was carefully examined in *Dalehite v. United States*, 346 U.S. 15 (1953). *Dalehite* involved a suit against the United States arising from the explosion of two ships loaded with fertilizer. The government had engaged the ships pursuant to a federal assistance program to transport fertilizer to countries whose economies had been damaged by World War II. Plaintiffs alleged the government had been negligent in failing to label the fertilizer packages to warn of their volatility. In ruling that the discretionary function exception barred the suit, the Court observed that Congress created the exception to ensure that actions brought against the United States would be restricted to such "ordinary common law torts "as automobile collisions. 346 U.S. at 28. It described the exception to include the initiation of programs and activities as well as

> determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.

Id. at 35-36.

More recently, the Court examined the discretionary function exception in *United States v. Varig Airlines*, 467 U.S. 797 (1984). *Varig* involved suits against the United States for the alleged negligence by the Federal Aviation Administration (FAA) (or the Civil Aeronautics Agency, its predecessor) in inspecting certain aircraft modifications. Plaintiffs alleged that the FAA's negligent failure to discover design defects led to several aircraft disasters. The Court ruled that plaintiffs could not recover under California's "good samaritan" rule because the actions giving rise to the suit, "spot-checking" manufacturer's compliance with safety standards, was determined to be a discretionary function. *Id.* at 820. It instructed that the application of the discretionary function exception is determined by the nature of the conduct rather than the status of the actor and that it clearly applies to regulatory activities. *Id.* at 813-14.[3]

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[3] The district court in this case relied on the Supreme Court's explanation of the discretionary function exception in *Varig*. On appeal, appellants assert that *Varig* is inapplicable to this case because *Varig* involved "regulatory responsibilities" which are not present in this case. Nothing in 28 U.S.C. 2680(a) or in the law developed by the federal court limits the application of the discretionary function exception to regulatory activities. *Varig*, 467 U.S. at 809-10; *Dalehite*, 346 U.S. at 38; *Begay v. United States*, 768 F.2d 1059, 1063-64 (9th Cir. 1985). The analysis of the discretionary function exception contained in *Dalehite* and *Varig* is applicable to this case.

A. Factual Disputes

Appellants assert the district court erred in granting summary judgment because there exist disputed facts. In particular, they argue there are disputed facts concerning whether appellees were negligent and whether the decision not to warn was influenced by rational security concerns.

Summary judgment is a district court's decision that the moving party is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986). Because it is a legal decision rather than a finding of fact, it is subject to *de novo* review. *Morgan v. Mobil Oil Corp.*, 726 F.2d 1474, 1477 (10th Cir. 1984). We therefore apply the standards set forth by the Supreme Court and Fed. R. Civ. P. 56(c) to this case.

The Supreme Court recently elaborated on the requirements for the grant of summary judgment. In *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986), the Court stated that summary judgment may be granted only when there is no "genuine issue of material fact," but cautioned that "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion." (emphasis in original). Whether there is a genuine issue of material fact turns on whether "a proper jury question was presented." *Id.* Thus, the court must determine whether "there are any genuine factual issues that properly can be resolved only by a finder of fact . . . ." *Id.* at 2511. "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 2510.

The district court determined there were factual disputes among the parties, but concluded those disputes were irrelevant to the issue whether the government's acts were discretionary. *Barnson*, 630 F. Supp. at 420. The central issue in this case is whether federal officials exercised discretion by not warning

miners of radiation hazards and not regulating uranium mining safety. Section 2680(a) maintains sovereign immunity "whether or not the discretion involved is abused." Thus, the discretionary function exception applies even when the discretionary acts constitute negligence. *General Public Utilities Corp. v. United States*, 745 F.2d 239, 245 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985). Factual issues concerning negligence are irrelevant to the central issue whether the federal officials' actions were discretionary. *Hylin v. United States*, 755 F.2d 551, 553 (7th Cir. 1985).

In determining the decision by federal officials not to warn miners of radiation hazards was discretionary, the district court found two factors dispositive: (1) the study would not have been possible without secrecy and (2) the AEC's concerns about national security influenced that decision. *Barnson*, 630 F. Supp. at 421. The court noted that those factors were not disputed. The appellants, however, now contend that the issue whether the decision not to warn was based on national security concerns is disputed. The record indicates that the United States supported its motion for summary judgment with exhibits demonstrating the AEC's concern that informed miners would flee the uranium mines and threaten the nation's uranium supply. We have scrutinized the record and find nothing in appellants' response to the motion for summary judgment, the documents attached thereto, or in a transcript of a deposition of Jesse Johnson, a retired official of the Raw Materials Program of the AEC, which would contradict the government's assertions. A party opposing a motion for summary judgment must come forth with specific facts showing the existence of a genuine issue for trial. Fed. R. Civ. P. 56(e); *Dart Industries, Inc. v. Plunkett Co. of Okla.*, 704 F.2d 496, 497 (10th Cir. 1983). Appellants have failed to respond with such facts, and the district court correctly concluded there were no issues of material fact.

B. Negligence Claims

Appellants also argue the district court improperly granted summary judgment because PHS physicians breached certain nondiscretionary medical duties and the government breached nondiscretionary "good samaritan" duties. We agree with the district court's disposition of these issues.

Appellants assert that physicians and industrial hygienists involved in the PHS study negligently failed to warn miners of dangers associated with radiation exposure in uranium mines. Had the decision not to warn been a medical judgment, it might not come within the discretionary function exception. *See, e.g., Jackson v. Kelly*, 557 F.2d 735 (10th Cir. 1977). There is no evidence in the record of this case which would indicate that the government physicians and hygienists undertook the medical care and treatment of the miners under study. On the contrary, the record reflects that the decision not to advise the miners of the health risks was based on political policy rather than on medical considerations. Thus, the decision not to warn was discretionary. *Varig*, 467 U.S. at 820. Furthermore, the discretionary function exception is applicable regardless of whether the physicians and hygienists participated in the creation of that policy decision or merely complied with it. *Dalehite*, 346 U.S. at 36. The district court's ruling on this issue was correct.

The district court also correctly ruled that the discretionary function exception applies to appellants' "good samaritan" claim. Appellants assert that the exception should not apply because the government undertook a duty to warn the miners of radiation dangers when it began the study. Assuming such a duty was created and the government breached that duty, nothing more would be established than negligence. *See* Restatement (Second) of Torts §§ 323 and 324A (1965). Because the decision not to warn was a discretionary policy

decision, if the government was negligent, it would not be liable for such negligence. *Russell v. United States*, 763 F.2d 787, 787 (10th Cir. 1985) (following *Hylin v. United States*, 755 F.2d 551 (7th Cir. 1985)); *General Public Utilities*, 745 F.2d at 243 n.6; *Begay v. United States*, 591 F. Supp. 991, 1007 and 1013 (D. Ariz. 1984). (The government's decision not to warn uranium miners of possible radiation injury is a discretionary decision not subject to liability for breach of good samaritan duty.), *aff'd*, 768 F.2d 1059 (9th Cir. 1985).

C. Mandatory Duty

Appellants assert the AEC had a mandatory duty imposed by statute to protect the health of the uranium miners. 42 U.S.C. § 2051 provides in relevant part as follows:

> § 2051. Research assistance
>
> (a) The Commission is directed to exercise its powers in such manner as to insure the continued conduct of research and development and training activities in the fields specified below, by private or public institutions or persons, and to assist in the acquisition of an ever-expanding fund of theoretical and practical knowledge in such fields. To this end the Commission is authorized and directed to make arrangements (including contracts, agreements, and loans) for the conduct of research and development activities relating to –
>
> . . .
>
> (5) the protection of health and the promotion of safety during research and production activities;
>
> . . .
>
> (d) The arrangements made pursuant to this section shall contain such provisions (1) to protect health, (2) to minimize danger to life or property, and (3) to require the reporting and to permit the inspection of work performed thereunder, as the Commission may determine.

On appeal, appellants argue that these provisions imposed a mandatory duty on the AEC to establish minimum standards of conduct for the health and safety of uranium miners. It is their position that the duties created by this statute are applicable to the AEC during the mining stage because the extraction of uranium one may be considered a "production activity" as described in § 2051(a) (5). We agree with the district court that uranium mining is not included within the scope of § 2051(a) (5).

Statutory phrases are not construed in isolation; they must be construed in the context of the statute or act as a whole. *United States v. Morton*, 467 U.S. 822, 828 (1984); *Pac. Mut. Life Ins. Co. v. Am. Guar. Life Ins.*, 722 F.2d 1498, 1500 (9th Cir. 1984). Generally, when the same words are used in different sections of the law, they will be given the same meaning. *Firestone v. Howerton*, 671 F.2d 317, 320 n.6 (9th Cir. 1982). It is apparent from a review of the Atomic Energy Act as a whole, 42 U.S.C. §§ 2011-2296, and § 2051 in particular, that the terms "production activities" were not meant to include the extraction of uranium ore. The act defines the term "produce" and "production facility" with reference to the manufacture of "source material" such as uranium. 42 U.S.C. §§ 2014(u) and (v).[4] Nowhere in the Act are the terms "produce" or "production" used in the mining context. Those terms are used only in conjunction with post-extraction aspects of the nuclear power industry. Furthermore, the use of the

---

[4] The statute defines the words "produce" and "production facility" as follows:

> (u) The term "produce," when used in relation to special nuclear material, means (1) to manufacture, make, produce, or refine special nuclear material; (2) to separate special nuclear material from other substances in which such material may be contained; or (3) to make or to produce new special nuclear material.

(Cont. on p. A-11)

terms "production activities" in the context of § 2051 does not reveal a Congressional intention to regulate uranium mine safety. We note that the other subsections in § 2051 concern post-extraction matters. Summary judgment, therefore, was proper.

III.

In summary, we conclude that the district court properly granted summary judgment because there are no issues of material fact, the discretionary function exception applies to the negligence claims, and 42 U.S.C. § 2051 does not impose a mandatory duty on the AEC to establish regulations concerning uranium mining safety. The district court's grant of summary judgment is affirmed.

AFFIRMED.

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[4] (Cont. from p. A-10)

(v) The term "production facility" means (1) any equipment or device determined by rule of the Commission to be capable of the production of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH
JUL 1 12 02 PM '85
PAUL L. BADGER
Clerk

SYLVIA BARNSON et als,	:	
Plaintiffs,	:	
v.	:	ORDER GRANTING
UNITED STATES OF	:	DEFENDANT'S
AMERICA,	:	MOTION FOR
Defendant.	:	SUMMARY JUDGMENT

CONSOLIDATED)
C-80-0119A
C-81-0045W
C-81-0715J
C-81-0719W

Stewart L. Udall, Phoenix, Arizona, Wayne Owens and Kenley Brunsdale, Salt Lake City, Utah, and Thomas S. Udall, Santa Fe, New Mexico, for the plaintiffs.

Edward Jiran, Laura Rockwood and Russell Young, U.S. Department of Energy, Washington, D.C., Paul F. Figley, U.S. Department of Justice, Washington, D.C., and Brent D. Ward and Lawrence J. Leigh, U.S. Attorney's Office, Salt Lake City, Utah, for the defendant.

I. INTRODUCTION

The plaintiffs in this case seek compensation for serious illness and death suffered by numerous uranium miners. According to the plaintiffs, these miners incurred injury from radiation in the Marysvale, Utah uranium mines. The original complaint alleged tort claims against the uranium company (Vanadium Corporation of America and its successor Foote Mineral Company) and the United States. The plaintiffs settled the case against Vanadium Corporation and Foote Mineral on January 31, 1985. The United States is the only remaining defendant.

The claims against the United States stem from a Public Health Service study which began in Marysvale, Utah 35 years ago. The study gathered data about the dangers of uranium mining. According to the plaintiffs, the study revealed that uranium miners worked in extremely dangerous conditions. The complaint alleges that miners suffered radiation injury because the federal government breached a duty to warn them of radiation hazards. The plaintiffs also claim that the government breached a duty to regulate mine safety. These claims against the United States arise under the Federal Tort Claims Act.

On December 19, 1984, the United States moved for summary judgment, arguing that sovereign immunity bars the plaintiffs' suit. The United States is immune from suit unless Congress waives the immunity. *See, e.g., Dalehite v. United States*, 346 U.S. 15, 30 (1953). The Federal Tort Claims Act eliminates immunity for many tort suits against the federal government. Nonetheless, the "discretionary function" exception to that Act retains sovereign immunity for claims ". . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether

or not the discretion involved be abused." 28 U.S.C. § 2680(a). The discretionary function exception prevents ". . . judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort." *United States v. Varig Airlines*, 104 S. Ct. 2755, 2765 (1984). Arguing that the acts giving rise to the complaint were discretionary, the United States moves for summary judgment.

II. THE DECISION NOT TO WARN

The complaint alleges that the Public Health Service negligently failed to warn the uranium miners of radiation danger. The parties agree that the Service undertook a study of the health effects of mine radiation and failed to disclose the study results to the affected miners. The issue here is whether the decision not to warn was "discretionary" under 28 U.S.C. § 2680(a).

A. IMMATERIAL FACTUAL DISPUTES

The court must first determine whether genuine and material factual disputes preclude summary judgment.

The parties disagree over the extent to which the government knew of radiation dangers when the Public Health Service study began. This dispute relates to the foreseeability of the alleged injury. Foreseeability is an important element of the negligence issue, yet the discretionary function exception immunizes discretionary acts whether they are negligent or not. 28 U.S.C. § 2680(a). Foreseeability is therefore immaterial to the issue now before the court.

Other factual disputes are immaterial because they relate to negligence rather than sovereign immunity. These disputes include the issue of when and how the study began, the question whether the government did an objective study and the

disagreement over the year that federal officials first learned of significant radiation dangers. The plaintiffs' allegations concerning the "unique Marysvale situation" fit into the same category. According to the plaintiffs, Marysvale was a "special laboratory" used by federal officials to learn about radiation hazards. The plaintiffs argue that this special relationship between the miners and federal investigators created a heightened duty for the defendant. The extent of the duty owed by the plaintiffs is material to the negligence issue and immaterial to the question whether a discretionary decision occurred.

The parties also disagree over the status of the government officials who made the decision not to warn. According to the defendant, high level officials in the Public Health Service and Atomic Energy Commission made the decision. In addition, the defendant claims that a study protocol issued from high levels at the Public Health Service. The defendant alleges that this protocol directed the study toward collection of data; educating miners was not an objective of the study.

The plaintiffs claim that Duncan Holaday, a Public Health Service Investigator, made the decision not to warn the miners. According to the plaintiffs, no study protocol even existed; Holaday made the decision "in the field" without direction from higher authorities. The plaintiffs do not address the AEC's role in the decision.

The court is convinced that the dispute over the status of the decisionmaker is not material to the immunity issue. In the *Varig Airlines* case, the Supreme Court reaffirmed the principle that ". . . it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." 104 S. Ct. at 2765. In determining the nature of the disputed conduct here, it is immaterial whether high level officials made the decision or directed field workers through a protocol. The critical question is whether

the decision not to warn is appropriately characterized as "discretionary." The court turns to this question next.

B. THE NATURE OF THE DECISION

The parties do not dispute the two considerations that motivated the decision not to warn. First, the parties agree that the study would not have been possible without secrecy. The uranium mines were on private property. The government needed private owners' permission to gain access to the mines. Afraid that adverse publicity might make the miners flee, the owners conditioned access to the mines upon an agreement that the government would keep the study results from the miners.

Second, according to the defendant, the Atomic Energy Commission's concerns about national security influenced the decision not to warn. The AEC feared that informed miners would flee the mines and thereby threaten the nation's uranium supply. The plaintiffs do not dispute this contention.

Given the two considerations discussed above, the court believes that the decision not to warn was discretionary within the meaning of 28 U.S.C. § 2680(a). The court believes that the agreement with the private mine owners arose from the social and political concerns which led to the study in the first place. The agreement involved the type of policy judgments which are at the core of the discretionary function exception. The AEC's judgment falls into the same category. The court believes that national security judgments are classic examples of the social and political decisions that the discretionary function exception was intended to immunize. *See Varig Airlines,* 104 S. Ct. at 2768.

C. GOOD SAMARITAN CLAIM

The plaintiffs argue that the discretionary function exception does not apply to their "good samaritan" claim. The plaintiffs

suggest that government acts, whether discretionary or not, create an actionable duty if analogous acts by a private individual would create a good samaritan duty.

The plaintiffs' good samaritan claim arises from the decision not to publicize the study results. According to the plaintiffs, the government created a duty of due care when it voluntarily began the uranium miner study. The plaintiffs argue that this good samaritan responsibility included a duty to warn the miners that they were in danger.

The case law does not support this view. Because discretionary acts are immune regardless of whether they are negligent, the existence of a good samaritan duty is irrelevant to the discretionary function inquiry. *See Russell v. United States*, No. 83-1947, slip op. at 2 (10th Cir. June 10, 1985); *General Public Utilities Corp. v. United States*, 745 F.2d 239, 243 n.6 (3d Cir. 1984). The plaintiffs' cases are in accord. Some cases cited by the plaintiffs attach good samaritan responsibility to the government when its acts are operational rather than discretionary. *See McMichael v. United States*, No. 83-2497, slip op. at 5 (8th Cir. Jan. 2, 1985); *Varig Airlines*, 104 S. Ct. at 2766. The plaintiffs' other cases either support this court's analysis or turn upon factors other than the discretionary function doctrine. *See Varig Airlines* at 2764-65. The plaintiffs cite no cases for the proposition that discretionary government acts can establish an actionable good samaritan duty. Summary judgment is justified for the good samaritan claim.

D. PROFESSIONAL NEGLIGENCE CLAIM

The professional negligence claim also arises from the failure to warn. According to the plaintiffs, the medical doctors and industrial hygienists involved in the Public Health Service study owed a heightened duty of care to the plaintiffs. The plaintiffs claim that these professionals should have warned the miners of

their dangerous working conditions. The plaintiffs imply that these professionals' judgments were nondiscretionary by nature.

The case law does not remove immunity for professional judgments. The analysis of professional negligence under the discretionary function doctrine is no different from the analysis of ordinary negligence. The critical question is whether the professional's act was grounded in a policy decision. *See, e.g., Blessing v. United States,* 447 F. Supp. 1160, 1185 (E.D. Pa. 1978).

As the court notes above, the decision not to warn was discretionary. Any professionals who assisted in making that decision therefore performed a discretionary function. Professionals who *complied* with the policy decision by failing to warn that uranium ore, either alone or in combination with x-ray treatment, might be harmful also performed a discretionary function. As the Supreme Court noted in *Dalehite v. United States,* 346 U.S. 15, 36 (1953), ". . . acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." *See also Allen v. United States,* 588 F. Supp. 247, 336-37 (D. Utah 1984). Summary judgment is justified for the professional negligence claim.

IV. THE DECISION NOT TO REGULATE

The complaint alleges that the government breached a duty to regulate uranium mine safety. For the reasons stated below, summary judgment is justified for the claims arising from the alleged failure to regulate.

A. FAILURE TO REGULATE THROUGH CONTRACT

The plaintiffs contend that the Atomic Energy Commission was negligent because it did not require safety procedures in

its uranium procurement contracts. The decision whether to regulate safety through such contracts requires an analysis of various social and political factors. It is the type of judgment which should not be second-guessed by the judiciary. Such judgments come within the core of discretionary decision-making. *See, e.g., Blaber v. United States,* 332 F.2d 629, 631 (2d Cir. 1969). Summary judgment is justified for the claims arising from the contract allegations.

The Walsh-Healy Act, 41 U.S.C. § 35 *et seq.*, which requires inclusion of certain safety requirements in public contracts, does not change this conclusion. The plaintiffs are estopped from asserting claims arising from that Act. In one of the cases now consolidated before this court, Judge David K. Winder ruled that the Walsh-Healy Act does not establish an actionable tort duty. Order Granting Defendant's Motion to Dismiss (Filed July 8, 1981 in C-81-0045W).

B. FAILURE TO REGULATE THROUGH RULEMAKING

The parties dispute whether federal officials made a conscious decision to leave regulation of mine safety to the states. Even if the plaintiffs are correct, and the government made no such decision, failure to adopt *federal* safety regulations was discretionary activity.

When the government fails to adopt safety regulations, it usually performs a discretionary function. *See, e.g., Miller v. United States,* 522 F.2d 386 (6th Cir. 1975) (failure to adopt stricter air safety regulations is immune discretionary function); *Baird v. United States,* 653 F.2d 437 (10th Cir. 1981) (failure to make safer airline flight information materials is immune discretionary function); *Garbarino v. United States,* 666 F.2d 1061 (6th Cir. 1981) (failure to promulgate regulations requiring a "crashworthiness" test is immune discretionary function).

If an agency has a mandatory duty to regulate a particular field, an exception to the usual rule applies. The discretionary function exception does not immunize failure to comply with a mandatory duty. *See, e.g., Payton v. United States,* 636 F.2d 132 (5th Cir. 1981); *Griffin v. United States,* 500 F.2d 1059 3d Cir. 1974).

There is no mandatory duty in this case which would remove sovereign immunity. The Public Health Service and HEW did not even have authority to compel mine operators or state officials to take remedial action. *See Begay v. United States,* 591 F. Supp. 991, 995-96 (D. Ariz. 1984).

The plaintiffs do however cite the Atomic Energy Act for the proposition that the AEC had a mandatory duty to regulate mine safety:

> (a) The Commission is directed to exercise its powers in such manner as to insure the continued conduct of research and development and training activities in the fields specified below, by private or public institutions or persons, and to assist in the acquisition of an ever-expanding fund of theoretical and practical knowledge in such fields. To this end the Commission is authorized and directed to make arrangements (including contracts, agreements, and loans) for the conduct of research and development activities relating to– . . . (5) the protection of health and the promotion of safety during research and production activities. . . . (d) The arrangements made pursuant to this section shall contain such provisions (1) to protect health, (2) to minimize danger to life or property, and (3) to require the reporting and to permit the inspection of work performed thereunder, as the Commission may determine.

42 U.S.C. § 2051.

The plaintiffs suggest that uranium mining is a "production activity" and that the PHS study was a "research activity" within the scope of § 2051(a) (5). As the defendant stresses, however, "production activities" concern manufacture of "special nuclear material," not extraction of "source material" such as uranium. *See* 42 U.S.C. §§ 2014 (u) and (v); 1954 U.S. Code Cong. & Ad. News 3467; 42 U.S.C. §§ 2014 (z) and (aa). Any AEC duties to reduce health problems associated with production activities did not extend to uranium mining.

AEC duties concerning research activities did not extend to the Public Health Service study either. Section 2051(a) addresses protection of health in the context of research activities listed in other subsections of the same provision. The defendant correctly notes that the list in § 2051 concerns nuclear development *after* the mining stage. Section 2051 does not govern mining research. The court concludes that the AEC had no mandatory duty to regulate uranium mine safety. *See Begay*, 591 F. Supp. at 1003-1004. Summary judgment is therefore justified for the claims arising from the failure to regulate.

The court HEREBY GRANTS the defendant's motion for summary judgment.

The court directs the defendant to prepare and submit a judgment reflecting the result of this order.

DATED this 30 day of June 1985.

/s/ Aldon J. Anderson

ALDON J. ANDERSON

United States Senior Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
C404 UNITED STATES COURTHOUSE
DENVER, COLORADO 80294

June 2, 1987

ROBERT L. HOECKER
Clerk

Mr. Paul L. Badger, Clerk
United States District Court
District of Utah
350 S. Main Street, Room 256
P. O. Box 3900
Salt Lake City, UT 84110

Re: 85-2470; Barnson, et al, vs. U.S.A.
District Court No. C-80-119A, C-81-0719,
C-81-45W, C-81-0715J

Dear Mr. Badger:

Pursuant to Rule 41 of the Federal Rules of Appellate Procedure, as amended, I am enclosing a certified copy of the judgment, and a copy of the opinion, which shall constitute the mandate of this Court. You will please file this mandate in the records of your court immediately upon receipt of it by direction of this Court. I am also enclosing a form of receipt for you to sign and return to this office.

The original record on appeal will be returned to you under separate cover.

Sincerely yours,

ROBERT L. HOECKER, Clerk

/s/ Robert L. Hoecker

RLH/mt

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

* * * * * * * * * * * *

BARNSON, et al., Plaintiffs, v. FOOTE MINERAL CO., et al., Third-Party Plaintiffs and Defendants v. UNITED STATES OF AMERICA, Third-Party Defendant.	CONSOLIDATED ACTION NUMBERS C-80-0119A, C-81-0719W C-81-0045W AND C-81-0715J AFFIDAVIT OF DUNCAN A. HOLADAY

STATE OF NEW YORK)
) ss.
County of Putnam)

DUNCAN A. HOLADAY, being first duly sworn, upon his oath deposes and says:

1. I am the same Duncan A. Holaday who has been deposed twice in the above case, and I was also a witness in the *Begay* case in Federal Court in Arizona and testified under oath in that lawsuit.

2. As an industrial health field worker for the U.S. Public Health Services, I first became involved with the radiation safety problem in U.S. uranium mines in 1949, and soon there-

after I began serving as the chief P.H.S. investigator regarding this industrial safety problem.

3. During the period from 1949 to my retirement from P.H.S. in 1970, I was working out of the Salt Lake City field station of U.S. P.H.S. and was involved in – or in charge of – environmental studies of various uranium mines on the Colorado plateau (including the Marysvale, Utah uranium mines); and during this same period of time I spent more time in the field spearheading the effort to get the states and mining companies to institute effective radiation controls in the uranium mines than any other person in the Public Health Service.

4. Also during the above-mentioned time period, to my knowledge neither the Surgeon General nor any of his subordinates ever made any policy or planning decision which established any guidelines or any "protocol" to govern the conduct of the uranium mining safety work P.H.S. employees were performing in and out of the Salt Lake City field station; in all my years on the job in Utah I never saw, or heard of, a "protocol" from the Surgeon General or his subordinates relating to the uranium miner study.

5. Moreover, to my knowledge neither the Surgeon General nor any of his subordinates ever made a decision directing me or any other federal employee at the Salt Lake City field station to *not* warn individual uranium miners (including the Marysvale, Utah uranium miners) about the radiation risks in their workplaces; to the contrary, as I testified in the *Begay* case, I made the decisions in the field not to warn the individual miners of the radiation risks they were encountering in their workplaces as part of a quid pro quo with the private companies who were mining uranium on the Colorado plateau in order to persuade said companies to allow Federal officials to inspect their uranium mines.

6. To my knowledge, there was never a decision made by the Surgeon General or his subordinates to leave the uranium mining safety problem in the hands of the states; from the start all of us were aware that the uranium mining states, including the State of Utah, were not prepared to handle this safety problem, and it was this lack of preparedness which caused me to take action and spearhead efforts to get safety controls in U.S. uranium mines from 1949 until some time in the mid 1950's.

/s/ Duncan A. Holaday
DUNCAN A. HOLADAY

SUBSCRIBED, SWORN TO and acknowledged before me this 18th day of September, 1984, by Duncan A. Holaday.

/s/ Mary C. Nagel
NOTARY PUBLIC

My Commission Expires:
March 31, 1985

MARY C. NAGEL
Notary Public, State of New York
No. 4789157
Qualified in Putnam County
Commission Expires March 31, 1985

APPENDIX E: STATUTES INVOLVED

RELEVANT SECTIONS OF THE FEDERAL TORT CLAIMS ACT

28 U.S.C. § 1346. United States as defendant

* * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * *

28 U.S.C. § 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

* * * *

28 U.S.C. § 2680. Exceptions;

The provisions of this chapter and section 1346(b) of this title shall not apply to–

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

RELEVANT SECTIONS OF FEDERAL RULE OF CIVIL PROCEDURE 56

Rule 56. Summary Judgment

(a) For claimant

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party

A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought

shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

APPENDIX F

LIST OF PETITIONERS

SYLVIA BARNSON, Surviving wife, RODNEY E. BARNSON, RANDY D. BARNSON, ELDORA BARNSON JOHNSON, JOHN STEVE BARNSON, JULIA MAE BARNSON WISE, and MAIDA BARNSON SIMMS, surviving children, heirs of Earl S. Barnson, deceased; VONDA L. CROPPER, surviving wife, HELEN E. CROPPER, surviving wife, HELEN E. CROPPER DAVIS, JANICE CROPPER PETERSON, WILLIAM D. CROPPER, CHARLES L. CROPPER, and LORRAINE CROPPER HARRIS, surviving children, heirs of William E. Cropper, deceased; EVA DEAN HANSON, surviving wife, CLYDE E. HANSON, DAVID B. HANSON and SHANE HANSON, surviving children of Byron Hanson, deceased; MAURINE PITTS, surviving wife of Elbert Pitts, deceased; ROWENA ANDERSON, surviving wife, BYRON ANDERSON, TERRAL ANDERSON, and ROBERT MELLOR, surviving children, heirs of BYRON ANDERSON, deceased; LEOLA CHRISTENSEN, surviving wife, ALVIN CHRISTENSEN, KARL CHRISTENSEN, NEIL CHRISTENSEN, and COLLEEN PETERSON, surviving children, heirs of Alvin Christensen, deceased; JOHN DINSMORE; RELL FREDERICK; ALDON McINTOSH and TONY McINTOSH, surviving children, heirs of LaMar McIntosh, deceased; ADA MORRILL, surviving wife, DALE MORRILL, DENZIL MORRILL, STEVE MORRILL, IDA ANN NEWBY, CLEORA PETERSON, and THELMA POPE, surviving children, heirs of Clarence Morrill, deceased; NORRENE NEEL, surviving wife, and SHELLY ANN NEEL, surviving child, heirs of Jack Neel, deceased; CARL NORTON; DOYLE PALMER, LaMOND PALMER, and LuDALE PALMER, surviving children, heirs of Edward Palmer, deceased; GAYLE NILLSON, surviving heir of Elbert Pitts, deceased; MARGARET QUINN, surviving wife, GARY QUINN, MILTON QUINN, and JANET LOTT, surviving children, heirs of George Quinn, deceased; BERNADINE HURLEY, surviving child, heir of Farley Smith, deceased; IDA MAE SWENSON, surviving wife,

Supreme Court, U.S.
FILED
SEP 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-104

In the Supreme Court of the United States

OCTOBER TERM, 1987

SYLVIA BARNSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Cases: Page

Alabama Electric Coop. v. *United States*, 769 F.2d 1523 (11th Cir. 1985) ---------- 7

Anderson v. *Liberty Lobby, Inc.*, No. 84-1602 (June 25, 1986) ---------- 4, 8

Aslakson v. *United States*, 790 F.2d 688 (8th Cir. 1986) ---------- 6-7

Begay v. *United States*, 768 F.2d 1059 (9th Cir. 1985) ---------- 6

Celotex Corp. v. *Catrett*, No. 85-198 (June 25, 1986) ---------- 8

Dalehite v. *United States*, 346 U.S. 15 (1953) ---- 5

Drake Towing Co. v. *Meisner Marine Const. Co.*, 765 F.2d 1060 (11th Cir. 1985) ---------- 7

Indian Towing Co. v. *United States*, 350 U.S. 61 (1955) ---------- 6

United States v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984) ----------2-3, 4, 5-6, 7

Statutes:

Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*---- 2

28 U.S.C. 2680(a) ---------- 1, 2

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-104

SYLVIA BARNSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of the holding of the courts below that their claims that the government negligently failed to warn uranium miners in the 1940s and 1950s of the possible dangers of radiation exposure are barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a).

1. Petitioners are former uranium miners (or their survivors) who worked in privately owned and operated mines in Utah in the 1940s and 1950s. Petitioners brought suit against the United States under

the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, contending that the government negligently failed to establish and enforce radiation safety standards in the underground mines where the miners worked and negligently failed to warn the miners of the possible dangers of radiation exposure, all resulting in injury to petitioners.

The district court granted the government's motion for summary judgment (Pet. App. B1-B11), ruling that the United States is immune under the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), from liability for the acts and omissions alleged.[1] Noting that the "parties agree[d] that the [Public Health] Service [PHS] undertook a study of the health effects of mine radiation [over 35 years ago] and failed to disclose the study results to the affected miners," the district court determined that "the critical question is whether the decision not to warn is appropriately characterized as 'discretionary' " (Pet. App. B3, B4-B5). The district court rejected as "immaterial" factual disputes between the parties "over the status of the government officials who made the decision not to warn," stating that " 'it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case.' " Pet. App. B4, quoting *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense* (*Varig Airlines*), 467

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[1] Section 2680(a) precludes the exercise of jurisdiction by the federal courts over "[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

U.S. 797, 813 (1984).[2] In the district court's view, "the decision not to warn was discretionary" because it was motivated by "two considerations," both of which "involved the type of policy judgments which are at the core of the discretionary function exception" (Pet. App. B5). Those two considerations were: (1) the impossibility of conducting the study "without secrecy," because the private mine owners "conditioned access to the mines upon an agreement that the government would keep the study results from the miners"; and (2) a concern for "national security," in that the AEC "feared that informed miners would flee the mines and thereby threaten the nation's uranium supply" (*ibid.*).[3]

The court of appeals affirmed (Pet. App. A1-A11). The court first rejected petitioners' contention that summary judgment was improper because material issues of fact remained in dispute. Noting that

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[2] The district court also rejected as "immaterial" other factual disputes between the parties concerning when and how the PHS study began, the objectivity of the study, and the degree to which the government knew of the radiation danger when the study began. Pet. App. B3-B4. In the view of the district court, these disputes all related to the "negligence issue," while "the discretionary function exception immunizes discretionary acts whether they are negligent or not." *Id.* at B3.

[3] The district court also rejected petitioners' contention that the discretionary function exception did not apply to their claims of a violation of a "good samaritan" undertaking or of "professional negligence" on the part of the PHS physicians who conducted the mine study. Pet. App. B5-B7. It further concluded that neither the PHS nor the Atomic Energy Commission (AEC) had a mandatory duty to regulate uranium mine safety and, hence, any claim based upon an alleged failure to regulate was similarly barred by the discretionary function exception. *Id.* at B7-B10.

" 'the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion,' " the court of appeals agreed with the district court that the factual disputes among the parties "were irrelevant to the issue whether the government's acts were discretionary." *Id.* at A6, quoting *Anderson* v. *Liberty Lobby, Inc.*, No. 84-1602 (June 25, 1986), slip op. 5 (emphasis in original). The court noted that petitioners had failed to controvert the government's showing that the failure to warn was motivated, in part, by "the AEC's concern that informed miners would flee the uranium mines and threaten the nation's uranium supply." Pet. App. A7. Relying on this Court's reasoning in *Varig Airlines* (467 U.S. at 813-814), the court observed that it is "the nature of the conduct rather than the status of the actor" (Pet. App. A5) that determines whether the discretionary function exception applies. Accordingly, since "the decision not to advise the miners of the health risks was based on political policy * * * the decision not to warn was discretionary" (*id.* at A8).[4]

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, as the district court stated, the government's decision not to warn in this case "involved the type of policy judgments which are at the core of the discretionary function

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[4] The court of appeals also rejected petitioners' contention that the government had breached an alleged nondiscretionary "medical" and/or "good samaritan" duty to the miners. Pet. App. A8-A9. And it affirmed the district court's determination that the AEC did not have "a mandatory duty imposed by statute to protect the health of the uranium miners." *Id.* at A9-A11. Petitioners do not press any of these claims.

exception" (Pet. App. B5). Further review is therefore not warranted.

a. Petitioners' primary contention is that this Court's decision in *Varig Airlines*, enunciating a "nature of the conduct" test for the discretionary function exception, has produced substantial confusion in the courts of appeals, and in particular has misled some courts to the conclusion that the planning/operational test set forth in *Dalehite* v. *United States*, 346 U.S. 15 (1953), is no longer the law (Pet. 6). In petitioners' view, Duncan Holaday—the chief PHS uranium mine investigator, whom petitioners allege "was *the* federal actor" (Pet. 4 (emphasis in original))—would "have been deemed an operational employee of the federal government" under *Dalehite*, in which case "petitioners would have prevailed" in the court of appeals (*ibid.*). Instead, "by giving a sweeping interpretation to language in" *Varig* (*ibid.*), petitioners allege that the courts below incorrectly held for the government. This contention is without merit and does not warrant further review.

Both of the courts below correctly followed the test established by this Court in *Varig Airlines* for application of the discretionary function exception and examined the "nature of the conduct" at issue, "rather than the status of the actor," to determine whether the exception was applicable. Pet. App. A5, A7, B5; *Varig Airlines*, 467 U.S. at 813. That approach is fully consistent with all of this Court's decisions. Indeed, in *Varig*, this Court explained that such an approach is perfectly consistent with its prior decision in *Dalehite*: "As the Court pointed out in *Dalehite*, the exception covers '[n]ot only agencies of government . . . but all employees exercising discretion.' 346 U.S., at 33. Thus, the basic in-

quiry concerning application of the discretionary function exception is whether the challenged acts of a Government employee—*whatever his or her rank*—are of the nature and quality that Congress intended to shield from tort liability." 467 U.S. at 813 (emphasis added). Hence, petitioners are incorrect in arguing that Duncan Holaday's rank or status governs the application of the exception, or would have prior to this Court's decision in *Varig Airlines*.[5]

Furthermore, the decision below is consistent with *Begay* v. *United States*, 768 F.2d 1059, 1065 (1985), where the Ninth Circuit, faced with virtually identical facts in a case brought by another set of uranium miners, concluded that the "decision reached by Holaday, not to disclose the possible dangers of uranium mining to the miners, was based on his judgment of what the best course of action was under the existing circumstances" and therefore was protected under the discretionary function exception. Petitioners' argument that Holaday should be classified as an "operational" employee and that the United States should be held liable for failing to warn uranium miners of the dangers of radiation is, therefore, contrary to the decisions of both federal courts of appeals that have considered the matter. There is, accordingly, no warrant for further review of this issue by this Court.[6]

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[5] Petitioners also contend (Pet. 6) that the "planning/operational" distinction is supported by this Court's decision in *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64 (1955). However, there was no discretionary function issue in *Indian Towing*, since the government had conceded the exception was inapplicable, and thus that case does not support petitioners' argument. See *Varig*, 467 U.S. at 811-813 & n.10.

[6] Petitioners suggest (Pet. 9 n.3) that the decisions in this case are in conflict with the decisions of the Eighth Circuit in

b. Petitioners also persist (Pet. 7-8) in their contention that summary judgment was inappropriate in this case because "there was no evidence to support" the district court's conclusions (1) that "the study would not have been possible without secrecy," and (2) that the AEC's "concerns about national security influenced the decision not to warn" the miners (Pet. App. B5). These fact-bound contentions are without merit and do not warrant further review.

Petitioners' first contention is surprising since pe-

Aslakson v. *United States*, 790 F.2d 688 (1986), and the Eleventh Circuit in *Drake Towing Co.* v. *Meisner Marine Constr. Co.*, 765 F.2d 1060 (1985), and *Alabama Electric Coop.* v. *United States*, 769 F.2d 1523 (1985), concerning the scope of the discretionary function exception. There is no conflict. In *Aslakson*, the court concluded that the alleged negligence in allowing insufficient vertical clearance of electrical transmission lines "involve[d] safety considerations under an established policy rather than the balancing of competing public policy considerations" and was consequently unprotected by the discretionary function exception (790 F.2d at 691, 693-694). Similarly, in *Drake Towing*, the court of appeals examined the " 'nature and quality of the discretion involved' " to conclude that, while the decision to place aids to navigation was discretionary (and therefore protected), "[o]nce such aids are established * * *, negligence in their maintenance and operation implicates operational functions and is actionable" (765 F.2d at 1064-1065 (citation omitted)). Finally, in *Alabama Electric*, involving an action for property damage resulting from erosion, the court of appeals remanded that case for determination whether the design decisions resulting in the harm involved " 'social, economic [or] political policy' " judgments (769 F.2d at 1527, 1528-1529, 1537 (citation omitted)). Thus, all of these decisions recognize (as did the courts below) that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case" (*Varig Airlines*, 467 U.S. at 813).

titioners' affidavit in opposition to summary judgment conceded that "the decisions * * * not to warn the individual miners of the radiation risks * * * [were made] as part of a quid pro quo with the private companies who were mining uranium * * * in order to persuade said companies to allow Federal officials to inspect their uranium mines" (Pet. App. D2). The district court's determination that it was undisputed that "the study would not have been possible without secrecy" (*id.* at B5) is therefore entirely correct.

Petitioners' second contention is also without merit. As the court of appeals noted, "[t]he record indicates that the United States supported its motion for summary judgment with exhibits demonstrating the AEC's concern that informed miners would flee the uranium mines and threaten the nation's uranium supply" (Pet. App. A7), and that petitioners failed to respond to that demonstration with specific facts showing the existence of a genuine issue for trial. Under these circumstances, the entry of summary judgment against petitioners was entirely appropriate. See *Anderson* v. *Liberty Lobby, Inc.*, slip op. 5; *Celotex Corp.* v. *Catrett*, No. 85-198 (June 25, 1986), slip op. 4-8.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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